[ORIGINAL CIVIL JURISDICTION]

M. M. K. MEERAH - - - Plaintiff

vs.

TAHAR BIN HAJI HASSAN - - Defendant

[MALACCA SUIT No. 74 OF 1932]

Landlord & Tenant—Excessive Distress—Fremature sale—Measure of damages.

The plaintiff rented a shophouse at Pulau Sebang from the defendant at a certain rent from 1st April, 1931. Some time in February 1932 defendant caused the plaintiff's goods to be distrained for arrears of rent alleged to have been due and afterwards sold the goods as such distress for the alleged arrears, whereas a small part only of the pretended arrears was in fact in arrear. Considerably more goods than were necessary to satisfy the actual arrears were seized.

Held, that the plaintiff was entitled to recover damages, inasmuch as the distress was excessive and the sale irregular in that it took place before the expiration of the period for replevy. *Tancred* v. *Leyland*, (1851) 16 Q. B. 669; *Crowder* v. *Self*, 2 Moody & Robinson 190; *Robinson* v. *Waddington*, (1849) 13 Q.B. 753; *Haseler* v. *Lemoyne*, (1858) 5 C.B.N.S. 530; *Megson* v. *Mapleton*, (1883) 49 L.T. 744; *Knotts* v. *Curtis*, 5 C. & P. 322; and *Wills* v. *Moody*, 7 C. & P. 59, applied.

ACTION tried before Whitley, J.

The material facts are related in the Judgment below.

S. C. Goho, for the plaintiff.

W. F. Zehnder, for the defendant.

Cur. Ad. Vult.

15-12-1932.

WHITLEY, J.—This is a claim for damages for wrongful distress. There is a direct conflict of evidence between the Plaintiff and the Defendant. The Plaintiff's version was as follows:—He rented a shop house No. 2099 Pulau Sebang from the Defendant on 1st April, 1931. Defendant asked for a month's rent in advance. Plaintiff gave him an I.O.U. and was given a receipt which reads as follows:—

> I the undersigned Tahar bin Haji Hassan the owner of a shop house No. 2099 in the Pulau Sebang Town limit have this day received the sum of $65/- (Dollars Sixty-five only) from the Tenant M. M. K. Meera Sahib & Co., as an advance to the above shophouse.
>
> The said sum of $65/- (Dollars Sixty-five only) is to be kept by me as an advance, and when the tenant leaves the shop-house he may take it back again.
>
> Further the tenant should inform me by one month's notice before he leaves the shop-house.
>
> Dated this 31st March, 1931.
>
> F.M.S.
>
> 4 cents stamp.

On the 10th April, Plaintiff paid Defendant $55/- in cash and received back the I.O.U. This payment is noted on the back. The Plaintiff explains the fact that the receipt purports to be for $65/- whereas only $55/- was paid by stating that Defendant did not wish the tenants of neighbouring similar shop-houses to know that he had let this shop to Plaintiff for $55/- because they were paying him $65/- and might ask to have their rents reduced if they come to know. This appears to me a reasonable explanation as we all know such things do happen. This payment is entered in Plaintiff's ledger under date 10th April, 1931, as an "advance of rent." On 13th May, in the Day Book appears an entry "paid rent for April $55/-" and on 15th June, an entry "paid rent for May $55/-". Similar entries appear about the middle of each month recording payment of rent for the previous month. The last entry appears on January 27th, 1932, "Rent for shop for "December $40/-." It is common ground that the rent had been reduced and that rent was fully paid up to 31st December, 1931. Plaintiff was ill in February. Defendant came to collect January rent on 10th February and Plaintiff asked him to agree to a reduction of $5/- as from March 1st, as otherwise he would give notice. Defendant refused and there was a dispute. From February 19th onwards Plaintiff was confined to his house some ½ mile distant from the shop by reason of his illness and left the business to his manager. On February 23rd, his manager told him the shop had been seized for 2 months' rent. On 27th he went to Alor Gajah to pay the rent under protest at the District Office in order to release the shop. He was told that the bailiff had gone to the shop to auction the property and proceeding to Pulau Sebang he found that the sale was over and the shop locked up. He ascertained that the purchaser was Lesut bin Timun and the price paid $185/-. He was later paid the surplus $81.05 at the District Office Alor Gajah.

The Defendant's version was as follows:—

> He rented the shop to Plaintiff for $60/- per month payable in advance on the 1st of each month. He did not receive any deposit in advance and he alleges that the receipt produced is a forgery. Plaintiff always paid on the 1st, 2nd or 3rd of each month the rent for that month. He paid the rent for December 1931, early in that month and thereafter paid nothing. Plaintiff was accordingly 2 months in arrears on

23rd February 1932, on which date Defendant went to the shop and demanded the rent. Plaintiff said "I have no money and you can seize." Defendant thereupon went to the District Office and swore an affidavit for distress claiming $80/- being 2 months' rent. The bailiff went with him and seized the goods in the shop the Plaintiff helping him to make an inventory and giving the bailiff the values of each item which the bailiff wrote down. The total came to $98.82 cents. Defendant valued the goods at $50—60 and the bailiff at $100. As the estimated value did not exceed $100 the bailiff had power to conduct the auction. He made out a notice with inventory fixing the sale for 10.30 a.m. on 27th February. He served it upon the Plaintiff who said he could post it upon the door which he did.

The sale was held on the 27th. Plaintiff was present and asked Lesut who happened to be passing by to bid for him. He handed to Lesut $100. When the bidding rose above $100 he asked Lesut to continue bidding and eventually the whole of the contents were knocked down to Lesut for $185 and subsequently the Plaintiff gave him the balance $85. Plaintiff then asked Lesut to put the purchase in the name of Ibramsah, Plaintiff's coolie. A document was written stating that Lesut had sold the property to Ibramsah and the goods were later removed to another shop which Defendant let to the Plaintiff.

Having to choose between these two versions I unhesitatingly accept that of the Plaintiff. I was impressed by the way he gave his evidence and his story is supported in most material particulars by his books. These books, Ledger and Day Books, six in number were carefully kept and in my opinion the relevant entries in them are clearly genuine. When recalled at the close of the case he was asked several unexpected questions and had difficulty in tracing certain items but although obviously unprepared and taken by surprise he was eventually able to point to the entries required and in each case they entirely substantiated his version as to the facts. He also produced bills supporting many of the items. I am satisfied that the receipt for the deposit is genuine. If it were a forgery it is most unlikely that Plaintiff would have thought of such a refinement as to make it out on the face of it as a receipt for $65/- paid on March 31st and a note on the back to the effect that only $55/- was paid and that on 10th April. Furthermore the counterfoil receipt book put in by Defendant bearing figures $60 shows clear signs of having once been either 65 or 55 and the counterfoils for May and June rent read $65 and $55 respectively which are also consistent with the Plaintiff's story.

There are several improbable features in the Defendant's version.

If the Plaintiff really was embarking on a scheme to defeat his creditors it seems unlikely that he would have waited until the sale was actually in progress before procuring some one—and that a man of another nationality—to bid for him. It seems equally unlikely that Lesut a comparative stranger would have bid up to $185 when he had been given only $100. I reject his evidence. As regards the bailiff's evidence I shall deal with that later when considering the question of damages.

Accepting as I do the Plaintiff's version it follows that on February 1st, the Defendant had in hand the deposit of $55 against $40 due for January rent and $40 which became due in advance for February rent. That is to say the Plaintiff was in arrears to the extent of $25. The distraint on February 23rd, for $80 was accordingly excessive but not illegal *ab initio*. Distraining for a greater amount than is actually due does not give a right of action if the distress is not excessive for the rent really due (*Tancred* v. *Leyland*, (1851), 16 Q.B. 669) but if more goods are seized than are necessary to satisfy the actual arrears the right of action does arise (*Crowder* v. *Self*, 2 Moody & Robinson 190). I am satisfied that there was no need to seize all the contents of the shop in order to satisfy arrears of $25. The distress was also irregular. The notice dated 23rd February, gave the usual 5 days prescribed in which to replevy. Those 5 days must be reckoned exclusively of the day of seizure so that the sale could not take place until the sixth day from seizure (*Robinson* v. *Waddington*, (1849) 13 Q.B. 753). It took place on the 27th which was only the fourth day. In the case of either irregular or excessive distress the action lies against the bailiff or the landlord so that in this case the landlord is properly made Defendant (*Haseler* v. *Lemoyne*, (1858) 5 C.B.N.S. 530 and *Megson* v. *Mapleton*, (1883) 49 L.T. 744).

The measure of damages is the same in cases of irregular and excessive distress when the goods have been sold namely the value of the goods less the rent in arrear and charges (*Knotts* v. *Curtis*, 5 C. & P. 322 and *Wills* v. *Moody*, 7 C. & P. 59).

It is extremely difficult to arrive at the value of the goods seized in this case. Special damages must be proved strictly. Mr. Goho for the Plaintiff put forward figures based upon the books and the stock-taking in December tending to show that there must have been property on the premises to the value of over $2,000. But that in my view is not sufficient. He has to prove what goods were actually seized and their value. The only definite evidence as to what was seized is the Inventory made by the bailiff. I am

asked to say that that inventory is not complete inasmuch as the Plaintiff alleges that when he left the shop on the 19th February, there were many other goods there which are not included in the Inventory. He has made out a list to the best of his recollection but he admits that it is only a rough estimate and it must be borne in mind that there were 4 days 19th—23rd during which he was absent from the shop and his manager or coolies none of whom were available as witnesses may have removed or sold goods without his knowledge. The onus is upon him to prove that those extra goods were there and I do not see how he can discharge that onus. Furthermore I am not prepared to hold that the bailiff made out a false inventory. To do so would have been to entail a grave risk inasmuch as the Plaintiff might have demanded that it be checked at any time between the seizure and the sale in which case the omission of such an item as 20 bags of rice must have been discovered. The view which I am inclined to take is this—that the Defendant overlooking the deposit made at the commencement of the tenancy or in the mistaken belief that it should not be treated as rent, thought he was entitled to distrain for 2 months' rent; that the inventory represents substantially what was found in the shop; that the values stated against each item are rough estimates given by the Defendant and that the Defendant made those values work out at $98 so that being under $100 there would be no need to employ an auctioneer. (The bailiff must I think be mistaken in his recollection that the Plaintiff gave these estimates as it is manifestly absurd for example that he would have valued 175 tins of coffee however small at $1.70 or less than one cent per tin.

I accordingly hold that the Plaintiff has not proved affirmatively that any articles were seized other than those on the list but the values set against each article constitute a gross undervaluation. The fact that the goods fetched nearly twice as much at a forced sale such as this supports that view. I accordingly take the valuation made by the Plaintiff as my basis. The figures given for the grocery goods seem not unreasonable but there is unfortunately no evidence available as to the size of the tins pots, etc. The value put on the furniture seems too high. Making allowance for under the circumstances not unnatural exaggeration I reduce his valuation from $857.66 to $700.

There will be judgment for the Plaintiff for $700 less rent due and 15.45 charges (agreed by counsel) and costs.

The Plaintiff is entitled to return of the $55 as Defendant has received $80 under the seizure.

Stay on the usual terms.

No stay as to costs but solicitor for respondent to give his personal undertaking to refund.

Judgment accordingly.

Solicitors for Plaintiff—*Rogers & Son.*

Solicitors for Defendant—*Zehnder Bros.*

F. M. S.

[ORIGINAL CRIMINAL JURISDICTION]

PUBLIC PROSECUTOR

vs.

HARNAM SINGH

[SELANGOR CRIMINAL TRIAL No. 37 of 1932]

Prosecution for perjury—Penal Code, Section 188—Proof of alleged false words used in a civil action—Admissibility of Judge's notes.

At the trial of a civil action the Judge is not bound by law to record the evidence given, but in practice he invariably does so. When so recorded the notes are admissible at a subsequent trial of one of the witnesses for the offence of giving false evidence at the trial of the civil action before that Judge.

Decision in *Public Prosecutor* v. *Mit Singh*, 3 F.M.S. L.R. 2, doubted.

R. C. Cussen, Deputy Legal Adviser, for the Public Prosecutor.

S. M. Sharma for the Accused.

The facts appear sufficiently from the Judgment.

THORNE, AG. C.J.—The accused was charged before me with the offence of giving false evidence in the course of the hearing of Civil Suit No. 21/32 in the Supreme Court, Kuala Lumpur, on the 7th day of April, 1932. The alleged false statement was as follows:—

> "I did not go to see Mr. Benjamin in his office. I did not tell Mr. Benjamin I knew nothing about the $1,800. I said nothing to him about this case. I again say that I did not go and see Mr. Benjamin about this case."

I held the accused guilty and convicted him. I imposed a sentence of 12 months rigorous imprisonment and a fine of $500, in default of payment of which a further 12 months rigorous imprisonment.

The prosecution proved beyond all doubt that the accused was called as a witness for the plaintiff in Civil Suit No. 21 32 which was heard before Mudie, J. at the Supreme Court, Kuala Lumpur, on the 7th day of April, 1932. There were called for the prosecution Messrs. Bostock Hill and Benjamin, who were the counsel engaged for the Plaintiff and the defendant respectively in Civil Suit No. 21/32, Mr. Sant Singh the